UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 2

EAST VILLAGE GRAND SICHUAN INC. D/B/A

GRAND SICHUAN RESTAURANT

and **Case 02-CA-143468**

CHINESE STAFF & WORKERS ASSOCIATION

EXCEPTIONS
OF RESPONDENT EAST VILLAGE GRAND SICHUAN, INC.
TO
DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF EXCEPTIONS

Respondent East Village Grand Sichuan Inc. ("Respondent") hereby excepts to the following findings and conclusions of the Administrative Law Judge in this matter set forth in the Decision dated January 14, 2016 (the "Decision") as follows:

1. Conclusion of Law 1 (p. 10, lines 24-25) that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the "Act") by discharging its employee Fang Xiao ("Xiao").
2. The following factual findings and/or conclusions of law:
    a. That Xiao was an employee of Respondent on January 2, 2015.

b. That Xiao's filing of an action against Respondent under the Fair Labor Standards Act and New York law was a "concerted activity."

c. That Respondent terminated Xaio because of concerted activity.

II. INTRODUCTION

In this case, the Administrative Judge was presented with a confused Complaint, a prosecution that focused on irrelevant facts and flawed theories, and witnesses who spoke only Chinese and whose testimony was often confused and confusing. It is not surprising, therefore, that the Judge decided the case on grounds not alleged in the Complaint, not supported by *relevant* evidence, and inconsistent with the Act and precedent.

As a result, the Decision imposes liability on an employer in a federal administrative proceeding for alleged damages that are covered by New York's workers compensation laws and Labor Law and by the Federal Fair Labor Standards Act (the "FLSA"). The relief awarded is, therefore inconsistent with the language and policy of the Act and with the entire structure of federal and state employment laws.

III. STATEMENT OF THE CASE

This case involves a restaurant employee, Fang Xiao ("Xiao"), who was injured in a fight with another employee in May 2014, provided notes from her doctor through October 2014 that she was unable to work, and then went silent and worked at other restaurants until she showed up at the restaurant on January 2, 2015 (the "Relevant Date") and asked for her job back. Viewed in the light most favorable to Xaio, the restaurant refused to re-hire her because she had filed a

wage an hour claim against it in November 2014, weeks after her doctor had permitted her to begin working.

A. *The State of Confusion.*

These simple facts were buried beneath a mountain of irrelevant testimony relating to (i) events starting in 2012, (ii) acts of employees other than Xiao, (iii) the details of Xiao's fight with another employee in 2014, (iv) alleged statements to Xiao from a former manager eleven months before the Relevant Date, and (v) testimony of biased co-employees regarding alleged statements by the restaurant manager about employees other than Xiao, etc., etc., etc.

The resulting confusion should not come as a surprise given the fact that the Charge in this case was filed by the Chinese Staff and Workers Association (the "Association") on December 21, 2014 (Decision at 1), weeks before the alleged termination even occurred . (Nothing in the Complaint or Decision indicates the connection between the Charging Party and Xiao. Although the Decision refers to the Chinese Staff and Workers Association as "Union" (at 1), nothing in the Complaint or the Decision indicates that the Association is a labor union or a collective bargaining agent for any group of employees or that the case presents any representation or collective bargaining issue.)

Adding to the confusion is the fact that, although the Complaint alleged unfair practices involving two employees, General Counsel offered testimony only as to Xiao. Thus much of the Complaint was simply irrelevant to the hearing.

B. *What the Case Really Involved.*

The only allegations in the Complaint regarding Xiao are set forth in Paragraph 6:

> 6. (a) On or about November 13, 2014, Respondent employee Fang Xiao engaged in protected concerted activity by filing a civil action against Respondent in the United States District Court, Southern District of New York (Civil Action No. 14-CV-9063 (RA)(JCF)), alleging violations of the Fair Labor Standards Act and the New York Labor Law.
>
> (b) On or about January 2, 2015, Respondent discharged employee Xiao.
>
> (c) At material times since January 2, 2015, Respondent has failed and refused to reinstate or offer to re-instate Xiao to her former position of employment.
>
> (d) Respondent engaged in the conduct described above in subparagraphs (b) and (c) because employee Xiao engaged in the conduct described above in subparagraph (a), and to discourage employees from engaging in these or other concerted activities.

These simple allegations led to the sole claim for relief set forth in Paragraph 7:

> 7. By the conduct described above in paragraphs 5(d) through (f) and paragraphs 6 (b) through (d) Respondent has been interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(l) of the Act.

The testimony *relevant* to these allegations and the single claim represented only a very small portion of the record. Simply put, the General Counsel's claim was that Respondent violated § 8(a)(1) by refusing to re-hire a former employee who:

- had abandoned her employment by not appearing for work for over two months after her doctor advised her that her injuries no longer precluded her from work and who in those two months worked at other restaurants (Dec. at 5, lines 21-24);
- had filed an a law suit against Respondent asserting individual claims (Id. at 37-40).

IV. ARGUMENT

1. Xiao abandoned her employment before the relevant date and therefore was not an "employee" within the meaning of Section 8(a)(1).

Since the sole claim is based on a statute, the analysis must begin with the language of the Act. The Decision, however, ignores the fundamental issue whether Xaio was an "employee" within the meaning of Section 8(a)(1) on the Relevant Date, January 2, 2015 – the date she alleges Respondent made statements regarding the FLSA suit she filed in November 2014. If she was not an "employee" on that date, she was not entitled to the protections of Section 8(a)(1).

The Act includes a circular definition of "employee":

> The term "employee" shall include *any employee*, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased *as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice*

29 U.S.C. 152(3) (emphasis added).

This circuity means that *employee,* when used as part of the definition, should be given its usual the dictionary meaning: "a person who works for another person or for a company for wages or a salary". *See,* http://www.merriam-webster.com/dictionary/employee. Under that definition, Xaio had not been an employee of Respondent since May 2014, over seven months before the alleged wrongful termination. Since that date, she had neither worked for Respondent nor received wages or salary from Respondent. (Any workers compensation benefits would not constitute wages or salary for this purpose; but even if they did, those were not paid for her "working".) Indeed, the Decision does not make any finding or point to any admissible evidence

in the record that would show that (1) Respondent agreed to employ Xaio while she was injured, (2) Respondent had a medical leave policy, (3) Respondent treated Xiao as an employee after she was injured in the May 28, 2014 fight, (4) Xaio acted as an employee even during the five months she was providing doctors notes, or (5) Respondent promised to keep her position open indefinitely. To the contrary, Xaio admitted that she never even visited the Restaurant after October 2014 and that she worked at three or four other restaurants once she no longer had her "doctor's notes." (Dec. 5 at lines 21-24) *See also,* Transcript 100:25-101:23.

Therefore, Xaio was not an "employee" on the Relevant Date, and Respondent did not violate § 8(a)(1) by refusing to (re)hire her.

2. <u>The General Counsel failed to prove "concerted action"</u>.

The Decision concedes that the only allegation of "concerted action" is Xiao's filing of an individual FLSA claim. (Dec. at 6, lines 38-40) It is settled that pursuit of an individual claim does not constitute "concerted action" protected under the Act. Action is "concerted" when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries, Inc.,* 268 NLRB 493, 497 (1984). Where an employee brings an action under a statute seeking to vindicate his own rights, as Xiao did under the FLSA, there is no concerted action.

Nor is there any policy basis for the Board to torture the Act to reach the conduct alleged in this case. Even if Xaio had been an employee and even if Gao had fired her because of her lawsuit, Xaio would have "retaliation" claims under the FLSA and state law. No purpose is

served by subjecting Respondent to double jeopardy and wasting public resources on redundant proceedings.

3. If the alleged concerted action was meeting with other employees, the Complaint did not give Respondent fair notice of that claim

The Judge allowed testimony into the record regarding statements made going all the way back to 2012 regarding Respondent's employment practices. The Judge erred in admitting that testimony and in relying on it in his Decision.

As noted above, the Complaint alleged only Xaio's individual FLSA claim as "concerted action." It was improper for the Judge to allow the General Counsel to expand the basis of her claim. *Bruce Packing Co. Inc. v. NLRB,* 795 F.3d 18 (D.C. Cir. 2015) (it must be clear that the parties understand exactly what the issues are at the time of the proceedings; where the respondent did not know that it could be held liable for a charge related to a promised wage increase until the close of the hearing, that standard was not satisfied; *citing, Conair Corp. v. NLRB*, 721 F.2d 1355, 1369 (D.C. Cir. 1983) (holding that Conair was prejudiced in not being afforded timely notice that the relevant issue was that a mailgram did not just threaten termination, but actually constituted termination.)

4. There was no evidence of animus toward concerted action.

Even Respondent had fair notice that the Complaint was charging that the "concerted action" at issue was the claims of other employees and not Xaio's own individual action, the Decision points to no evidence that Gao made statements that associated Xaio with the actions of other employees. It is settled that the General Counsel had the burden to prove that the

conversation on the Relevant Date was related to a common complaint and not related to the employee's own situation. *Alton H. Piester, LLC v. NLRB*, 591 F.3d 332, 340-41 (4th Cir. 2010). The General Counsel did not meet that burden because the entire conversation related only to Xaio's own law suit.

As the Decision states ("Findings of Fact" at p. 6, lines 25-29), the entire exchange on the Relevant Date was:

> ***Xiao***: "Can you arrange what time for me to return to work?"
>
> ***Sister Gao (restaurant manager)***: "You coming back to work? You suing the boss? You suing the restaurant and now you want coming back to work? This is not right. Go look for your lawyer. You want to come back to work?"

Thus, Gao's decision not to rehire Xaio was based solely on Xaio's individual suit against Respondent.

Nor is there any broader context that would show that Respondent was acting with an animus against "concerted action." First, the Judge found that the last conversation that Xiao had concerning other employees who were plaintiffs in a 2012 lawsuit against Respondent was in February 2014, 11 months before the alleged termination, and that conversation was with a supervisor who soon left Respondent's employment. (Dec. at p.3, lines 33, 46-47). Second, that conversation did not threaten any adverse employment action. Rather, the supervisor simply said "The Boss will not like you, and I'm not going to care about you." (Dec. at 3, line 39). Third, there is no evidence that the new manager, Sister Gao, ever spoke to Xiao about other

employees, even though Xiao testified that she continued to take breaks with the other employees until her fight at the end of May 2014. Fourth, the only testimony as to any statement attributed to Gao about Xaio after Xaio quit working in May 2014 was that in July 2014 (five to six months before the Relevant Date) Gao told Min Fu that Xaio had no illness and was just "acting out". (Dec. at 6, lines 6-7).

In short, the only possible evidence of any animus regarding concerted action were alleged statements were made by a former manager, who had not worked at the restaurant for almost a year before the alleged termination. Even if those statements were made, Xaio continued to work for over 3 months without any mention of her association with the other employees. Not only did she continue to work and be paid as usual from February to May, Gao, the new manager, took her side during the dispute which led to the fight with the other employee. In short, there is no evidence that Gao's statements to Xaio on the relevant date were based on any adverse animus regarding concerted action.

On these facts, the General Counsel failed to prove that, even if Respondent "discharged" Xaio, that discharge did not violate the *Wright Line* test. *Crady v. Liberty Nat. Bank and Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993) (finding employer's conclusion that employee had abandoned his job was not a pretext); *Jones v. United Parcel Serv., Inc.*, 461 F.3d 982, 991-92 (8th Cir. 2006) (job abandonment is legitimate reason for terminating employee even if prima facie case of discrimination proven).

IV. CONCLUSION

When the record in this case is edited of irrelevant testimony and tested by applicable law, there is only one possible conclusion, the General Counsel failed to prove that Respondent

violated § 8(a)(1). The Decision should therefore be reversed and the Complaint should be dismissed. Even if Xaio was injured on the job and was not paid in accordance with the wage and hour laws, she has ample statutory remedies under the FLSA and state law, all of which she is already pursuing. There is neither a need for NLRB intervention nor any justice in subjecting employers to multiple proceedings arising out of the same events.

Dated February 11, 2016

Flushing, New York

Respectfully submitted,

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THOMAS D. GEARON, being duly sworn deposes and says: that I am an attorney in the LAW OFFICES OF THOMAS D. GEARON, P.C, is over the age of l8 years and not a party to this action.

That on February 11, 2016, I served via electronic mail the annexed to **EXCEPTIONS OF RESPONDENT EAST VILLAGE GRAND SICHUAN, INC. TO DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE**:

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